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No. 90-741

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALETHA DEWSNUP,

Petitioner,

v.

LOUIS L. TIMM, JOHN NEIUWLAND and FLOYD M. CHILDS, Trustees of the UNITED PRECISION MACHINE AND ENGINEERING COMPANY PROFIT-SHARING TRUST, ABCO INSURANCE AGENCY, INC., and JOSEPH L. HENROID, as Trustee for the Annette Jacob Trust,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondents concede that the Third Circuit and Tenth Circuit are in conflict concerning the proper interpretation of Section 506(d) of the Bankruptcy Code and "that the bankruptcy courts are divided on the issue." Opp. at 6. They likewise recognize that the Seventh and Eleventh Circuits have indicated, while "[speaking] on

related issues," that Section 506(d) allows Chapter 7 debtors to void the undersecured portion of liens on real property. Opp. at 6. Since the filing of the Petition, moreover, still other federal courts have divided on the issue, demonstrating its continuing importance. *See In re Lange*, 120 B.R. 132 (Bankr. 9th Cir. 1990) (following Tenth Circuit below in holding that Chapter 7 debtor cannot use Section 506(d) to void undersecured portion of real property lien); *In re Douthart*, 1990 Bankr. LEXIS 2740 (Bankr. D.N.H. 1990) (same); *In re Richardson*, 1990 Bankr. LEXIS 2467 (Bankr. S.D. Ill. 1990) (following Seventh Circuit in holding that Chapter 7 debtor can use Section 506(d) to void undersecured portion of real property lien).

2. Respondents nonetheless suggest that the "freshness" (Opp. at 6) of this ever-widening conflict counsels against review in this case. But none of Respondents' reasons for ignoring this conflict and delaying resolution of this important and recurrent issue is persuasive.

First, Respondents argue that "there is no pressing need to address the issue presented here" because the value of these cases "is not often large" and because a "major institutional lender" might, at some later date, seek certiorari in a case where the "stakes are significant." Opp. at 8-9. That the application of Section 506(d) in many individual cases may not involve significant amounts, however, hardly suggests that the issue is unimportant to the individuals involved or, indeed, even to the lenders themselves. Recent press reports confirm that the matter is of substantial importance; it is an issue that is worth "millions of dollars" to the lending industry and "appears destined to spread throughout the country . . . as the recession worsens." Lehman, *Mortgage 'Cramdowns' Ease Debt Burden*, Wash. Post, Jan. 5, 1991, at F1, col. 4 (describing interests of Mortgage Bankers Association and Freddie Mac in pursuing a "test case" on this issue).

The reluctance of many parties to litigate this issue through the courts of appeals to this Court, simply because their particular cases may not justify the costs of appeal, does not call for delaying resolution of the issue where, as here, it is brought to this Court's attention. If anything, this reluctance suggests the vital importance of prompt resolution so that the current uncertainty does not further burden the courts, debtors and creditors. Indeed, as the Solicitor General aptly noted in another individual bankruptcy case in which the Court granted certiorari last week, "[b]ecause non-business debtors typically lack the means (and their creditors the financial motivation) to litigate before this Court, this case presents an appropriate and unusual opportunity to achieve uniformity on this important issue throughout the circuits." Brief for the Respondent, *Toibb v. Radloff*, No. 90-368 (Jan. 2, 1991), at 4.

Second, Respondents suggest that the conflict could evaporate if the Third Circuit has an opportunity, in some unidentified case, to "reconsider its view in the light of" this Court's recent decision in *Grogan v. Garner*, No. 89-1149, slip op. (Jan. 15, 1991). Opp. at 7-8. But the *Grogan* decision offers no "new reason" (Opp. at 7) for the Third Circuit to do so. In *Grogan*, this Court simply held that the dischargeability exceptions in Section 523(a) of the Bankruptcy Code, including the fraud exception, are subject to proof under the ordinary preponderance of the evidence standard. *Grogan*, slip op. at 11. While the Court concluded that the Code's "fresh start" policy does not require a higher standard of proof in fraud cases, it in no way undermined the significance of that policy in construing other sections of the Bankruptcy Code. *Id.* at 7. In any event, the Third Circuit did not rest its decision in *In re Gaglia*, 889 F.2d 1304 (3d Cir. 1989), primarily on this "fresh start" policy; rather, it grounded its holding in the "plain meaning" of Section 506(d). *Id.* at 1308.

Third, Respondents contend that the Court should deny certiorari because "Congress may well step in to clarify the matter." Opp. at 6-7. This possibility, of course, exists in every case where this Court is presented with an issue of statutory construction. It hardly provides a reason for denying certiorari—particularly where, as here, Respondents have identified no pending legislation that addresses this issue, much less any legislation that Congress is likely to enact into law.

3. This case squarely presents the question whether Section 506(d) enables a Chapter 7 debtor to void the undersecured portion of a lien on abandoned real property. That issue is of continuing importance, affecting many hundreds of American farmers and other individuals as well as the lenders with whom they do business. No sound reason exists for delaying this Court's consideration of the issue.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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